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No. 08-932

In The
Supreme Court of the United States

GENEVIEVE DICENZO, EXECUTRIX OF THE ESTATE OF JOSEPH DICENZO, AND GENEVIEVE DICENZO, IN HER OWN RIGHT,
Petitioner,

v.

GEORGE V. HAMILTON, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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February 24, 2009

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI*

Since 1984, Ohio has had in place statutes that severely limit the strict liability of non-manufacturer sellers of defective products to certain discrete situations, such as when the manufacturer of the defective product is not subject to judicial process in Ohio. These statutes were enacted explicitly to preclude the imposition of strict liability on suppliers and sellers of defective products except in those discrete instances. In an attempt to avoid these statutes, petitioner has been seeking in the instant lawsuit to impose strict liability on non-manufacturer sellers of asbestos products with respect to sales made **prior to 1977**, when the Supreme Court of Ohio, in the case of *Temple v. Wean United, Inc.*, 364 N.E.2d 267 (Ohio 1977), adopted Section 402A of the Restatement (Second) of Torts. The thrust of petitioner's argument has been that the "rule" adopted in the *Temple* case, imposing strict liability on non-manufacturer sellers (as well as on manufacturers), should be applied to sales of asbestos products that occurred prior to 1977.

The trial court and the Ohio Supreme Court, however, rejected petitioner's attempt to impose strict liability on non-manufacturer suppliers with respect to pre-1977 sales. Applying the three-factor test prescribed by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), those Ohio courts held, first, that the *Temple* case had established a new principle of law with respect to non-manufacturer sellers "that was not clearly foreshadowed" by prior decisions of the Ohio courts and, second, that imposing "such a potential financial burden on these non-manufacturing suppliers

years after the fact for an obligation that was not foreseeable at the time would result in a great inequity." (App. 27-28 to Petition.) Accordingly, since these findings met the *Chevron Oil* criteria, the Ohio courts held that the *Temple* decision should not be given retroactive effect.

Petitioner is now asking this Court to negate that holding (and the numerous other state supreme court decisions that have similarly adopted and approved the *Chevron Oil* three-part test) by announcing a rule that a state supreme court violates the equal protection clause of the Fourteenth Amendment of the United States Constitution whenever it holds that a particular pronouncement of state law should be limited to a prospective-only application.

As the following discussion demonstrates, such a rule would be contrary to public policy. In addition, there are several procedural and legal reasons why Petitioner's petition for writ of certiorari should be denied.

I. CERTIORARI MUST BE DENIED BECAUSE NO FEDERAL ISSUE WAS PRESENTED OR DECIDED BELOW.

Certiorari should be denied in this case because the only federal issue Petitioner alleges in her petition (infringement of the equal protection clause of the Fourteenth Amendment of the United States Constitution) was never raised by Petitioner in, let alone considered or decided by, any of the courts below.

This Court has consistently held that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83 (1997). *See also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981) (the Supreme Court will review a final judgment of a state supreme court "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system"); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Holly Farms Corp. v. Labor Bd.*, 517 U.S. 392, 392 n.7 (1996); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This policy is designed to allow state courts the first opportunity to consider a state law issue in light of federal constitutional arguments (*Cardinale*, 394 U.S. at 439), as well as to ensure that this Court has the benefit of a full and complete record upon which to weigh and decide a federal constitutional issue.

Accordingly, where, as here, a decision of a state's highest court is silent as to the federal question upon which the petitioner seeks to obtain certiorari, "it will be assumed that the omission was due to want of proper presentation in the state court unless the aggrieved party in this Court can **affirmatively** show the contrary." *Exxon Corp.*, 462 U.S. at 181 n.3 (quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969))) (emphasis added). *See also Bd. of Dir. of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)

(holding that where petitioners "did not present the [federal constitutional] issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal[s]" they "have made no such showing" that the issue was presented below); and *Street v. New York*, 394 U.S. 576, 582 (1969) ("If the [federal constitutional] question was not so presented, then we have no power to consider it [. . . .] unless the [petitioner] . . . can affirmatively show the contrary")

In the instant case, Petitioner DiCenzo cannot satisfy this burden because she failed to raise or present an equal protection argument in any of the courts below. Petitioner's only resort is to quote (at page 5 of her Petition) a single passing and oblique reference to possible "equal protection concerns" that was essentially buried in the Merit Brief that she filed in the Ohio Supreme Court, to wit: "In nearly every case, a newly adopted rule will apply to the parties before the court. Thus, the new rule has retroactive effect and remaining consistent in a rule's application is essential to avoid disparate results and serious equal protection concerns." The quoted sentence is the sole reference in any of Petitioner's briefs in the Ohio courts to "equal protection." Clearly, that solitary reference does not amount to the required standard of "presentment" and thus affords no basis for this Court to grant certiorari, especially since Petitioner did not present *any* equal protection *argument* in any of the courts below.

Moreover, even if it were assumed, *arguendo*, that the single reference quoted by Petitioner did raise an "argument" as to equal protection, there is no reason to believe that it raised a *federal constitutional* argument, as distinguished from a state constitutional

argument. In *Webb v. Webb*, 451 U.S. 493 (1981), this Court held that the petitioner's passing use of the phrase "full faith and credit" clause in her briefs in the state appellate courts did not give rise to a federal issue, since "nowhere did she cite to the Federal Constitution or to any cases relying on the *Full Faith and Credit Clause of the Federal Constitution*." 451 U.S. at 497 (emphasis original). Moreover, nowhere in the opinion of the state court from which the petitioner sought certiorari was "any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court." *Id.*, 451 U.S. at 495. Thus, *Webb* is directly on point with the present case, since no mention of any federal equal protection clause was made in the briefs filed with, or in the majority and dissenting opinions of, the Ohio Supreme Court. *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988), holding that a mere "generic reference to the Fourteenth Amendment" in the state court "is not sufficient to preserve a constitutional claim."

II. THE DECISION OF THE OHIO SUPREME COURT FOLLOWED, AND IS IN ACCORD WITH, SEVERAL LONG-STANDING DECISIONS OF THIS COURT.

As far back as 1932, starting with the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), this Court has held that state supreme courts have the right to determine whether their decisions would be applied retroactively or prospectively only. This Court stated in *Sunburst*: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It

may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions." *Id.* at 364.

In 1971, this Court expanded on the *Sunburst* decision by developing a test that courts, both state and federal, could use in determining when cases should not be given retroactive effect. In *Chevron Oil Co. v. Huson*, this Court held:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of retroactivity."

404 U.S. at 106-107 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)) (citing *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)).

In 1993 however, a majority of this Court adopted a different rule with respect to decisions made by this

Court when interpreting federal law. The majority held: "When this Court applies a rule of **federal law** to the parties before it, that rule is the controlling interpretation of **federal law** and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added).

In so holding, the *Harper* court continued to recognize the viability of *Sunburst* insofar as decisions of state high courts adjudicating issues of state law are concerned. Thus, citing *Sunburst*, the majority opinion stated that "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law cannot extend to their interpretations of federal law." *Id. at 100*. Since 1993, state supreme courts have taken this Court at its word. An overwhelming majority of those courts have held, as the Ohio Supreme Court did in the instant case, that "this language indicates that *Harper's* limitation of *Chevron Oil* applies to federal law only." *DiCenzo v. A-Best Prods. Co., Inc.* 897 N.E.2d 132, 139 (Ohio 2008).

Sunburst further declared that the "choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origins and nature." 287 U.S. 358, 365. State supreme courts have therefore adhered to this approach. *See, e.g., Findley v. Findley,* 629 S.E.2d 222, 227-228 (Ga. 2006), where the Georgia Supreme Court stated that "[b]oth prior to and following the entry of the three-pronged *Chevron Oil* test into this Court's jurisprudence in *Flewellen* [*v. Atlanta Casualty Co.*,

300 S.E.2d 673 (Ga. 1983)], this Court expressed a juristic philosophy that recognizes there are compelling exceptions to the general rule that judicial decisions apply retroactively." The Georgia Supreme Court then concluded that "the juristic philosophy of this State is more consistent with that expressed in *Chevron Oil* than that of *James B. Beam Distilling* and *Harper*." *Findley*, 629 S.E.2d at 228.

To the same effect is *Beavers v. Johnson Controls World Services, Inc.* 881 P.2d 1376, 1381 (N.M. 1994), where the Supreme Court of New Mexico concluded that the "jurisprudence of this state...is more nearly consistent with the views of the *Harper* minority that voted to retain *Chevron Oil* than with those of the majority that decided to cast it aside." What the New Mexico Court was here referring to was the view of dissenting Justices O'Connor and Rehnquist, who vigorously disagreed with the majority holding that all decisions of this Court interpreting federal law should be given retrospective effect. Justice O'Connor stated: "But even if one believes the prohibition on selective prospectivity desirable, it seems to me that the Court today takes that judgment to an illogical – and inequitable – extreme...Such a rule is both contrary to established precedent and at odds with any notion of fairness or sound decisional practice." *Harper*, 509 U.S. at 117.

The overwhelming majority of state courts are in accord with the latter view. While most state courts have recognized that there is a presumption of retroactivity, they also recognize that there can be exceptions. *See, e.g., Montells v. Haynes*, 627 A.2d 654, 660 (N.J. 1993) ("Prospective application is appropriate when a decision establishes a new

principle of law by overruling past precedent or by deciding an issue of first impression"); *Aleckson v. Village of Round Lake*, 679 N.E.2d 1224, 1228 (Ill. 1997) ("all reviewing courts have the power to exercise discretion in a just manner so as to do equity, factors which, as we have already noted, play a great role in considering whether to apply a previous decision prospectively"); *In re Commitment of Thiel*, 241 Wis. 2d 439, 449 (2001) ("an appellate court may employ the technique of prospective application – 'sunbursting' – to mitigate hardships that may arise with the retroactive application of a new rule of law"); *General Motors Corp. v. New Castle County*, 701 A.2d 819, 822 (Del. 1997) ("a court should deny retroactive application 'only where on balance the weight of the three *Chevron* factors favor prospective application'"); and *Dempsey v. Allstate Ins. Co.*, 104 P.3d 483 (Mont. 2004) (stating that it would apply a decision prospectively when all three *Chevron Oil* factors are met).

In the instant case, the Ohio Supreme Court followed this line of cases. In so doing, that Court relied on the holding of this Court in *Sunburst* and determined that "the *Chevron Oil* test is . . . consistent with Ohio law in addressing retroactive/prospective application of court decisions." *DiCenzo*, 897 N.E.2d at 138.

It should be further noted that, contrary to what Petitioner implies, the *Harper* case (on which Petitioner so heavily relies) made no mention of the equal protection clause in arriving at its holding that a decision of this Court interpreting federal law shall always be applied retrospectively. Indeed, as Petitioner herself acknowledges, state supreme courts

have consistently concluded that "*Harper* does not have constitutional significance and thus is not binding on their decisions regarding the retroactivity of new state rules announced in judicial decisions." (Petition, p. 8.) Therefore, lacking any specific language in the *Harper* decision that supports its equal protection argument, petitioner's only recourse is to suggest that *Harper* "evoked **considerations** of equal protection." (Petition, p. 7.) This Court should not grant certiorari on the basis of such tenuous "evocations."

Finally, the rule of law that Petitioner would have this Court adopt under the guise of "equal protection" would be bad public policy. Petitioner would have this Court hold that every new rule of law adopted by a state supreme court must be given retroactive effect, regardless of the circumstances. Indeed, under such a doctrine, a state supreme court could no longer specifically state, when issuing a decision, that the decision is not to be applied retroactively, since such a statement would violate the equal protection clause. State supreme courts would thus be precluded from holding, as the Ohio Supreme Court did in the instant case, that while "prospective-only application is justified only under exceptional circumstances," such justification occurs in a case that presents "the extraordinary circumstances that satisfy the *Chevron Oil* test." (App. 20 to Petition.)

III. THE RULE URGED BY PETITIONER IS NOT APPLICABLE TO THE FACTS OF THE INSTANT CASE.

A third reason why the petition should be denied is that the facts of this case do not meet the factual pre-

conditions of the rule that Petitioner is asking this Court to adopt. Petitioner urges this Court to impose on state courts the same rule with respect to retroactivity that the *Harper* case imposed on federal courts when interpreting federal law. If that were done, the new rule would read: "When [the highest court of the state] applies a rule of [ ] law to the parties before it, that rule must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or post-date [the state court's] announcement of the rule." *Harper*, 509 U.S. at 97.

However, the instant case could not serve as the basis for the adoption of such a rule since the Ohio Supreme Court decision that was the subject of this action, *Temple v. Wean United, Inc.*, was **not** a case in which the rule of law announced therein was actually "applie[d] to the parties before" the court in that case.

In other words, although the Ohio Supreme Court in *Temple* "adopted" Section 402A of the Restatement (Second) of Torts, the Supreme Court did not apply the portion of that Restatement rule relating to non-manufacturer sellers to any of the parties before it. In fact, the Ohio Supreme Court in *Temple* did not even impose Section 402A strict liability on the defendant manufacturer. Rather, the Supreme Court agreed with the lower courts that the punch press manufactured by defendant Wean United was not defective and that Temple's injury had actually resulted from modifications that had been made to the press by Temple's employer. The Supreme Court therefore affirmed the summary judgment that had been entered by the Common Pleas Court in favor of the defendants. Accordingly, since the new rule

"approved" in *Temple* was not "applie[d] to the parties before" the Ohio Supreme Court in that case, that new rule would not be retroactive even if the *Harper* "rule" were expanded to embrace decisions of state law announced by state supreme courts.

The fact that the *Temple* decision did not apply the new rule of strict liability (insofar as it embraced non-manufacturer sellers) to any of the parties before the Ohio Supreme Court in that case also means, of course, that the refusal of the Ohio Supreme Court in the instant case to apply *Temple* retroactively does not give rise to any "equal protection concerns." According to Petitioner's argument, such a concern arises when a state court applies "a new rule of state law to the litigants before them [sic] but not to other cases where the conduct to be considered occurred prior to the adoption of the new rule." (Petition, pp. 8-9.) Since, however, *Temple* was not a case in which the "new rule" was applied to the litigants before the court, it follows that not applying that rule to other litigants (like the petitioner in the instant case) does not deprive those litigants of the same "protection" that was given the litigant in *Temple*, because the *Temple* case actually gave plaintiff Temple no protection at all.

IV. EVEN IF CERTIORARI WERE GRANTED, PETITIONER COULD NOT PREVAIL ON THE MERITS.

Should Petitioner overcome the many procedural barriers outlined above, her claim would nonetheless fail if subjected to an equal protection analysis, because the state action at issue is rationally related to a legitimate governmental purpose.

There are three levels of review under this Court's equal protection jurisprudence, the most stringent being strict scrutiny. This level of review applies to classifications based upon race, national origin, and alien status (*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, (1986)), or to statutes that implicate fundamental rights (*United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). Intermediate scrutiny applies to classifications based upon sex or the marital status of a child's parents. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications, including the "class" of which Petitioner claims she is a member, are subject to rational basis review. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

"[O]ne who assails the classification...must carry the burden of showing that it does not rest upon a reasonable basis, but is essentially arbitrary," *Bringard v. Caruso*, 2008 U.S. Dist. LEXIS 31672, 10 (W.D. Mich. 2008) (citing *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911)), and that the state action at issue is illogical and unrelated to "any legitimate government purpose" *Bringard*, 2008 U.S. Dist. LEXIS, 31672, 10. Accordingly, should this Court grant the instant petition for writ of certiorari, rational basis review would be the applicable standard, and Petitioner would have the burden of showing that the *DiCenzo* decision is arbitrary, illogical and unrelated to any legitimate government purpose.

Petitioner cannot meet this heavy burden. As the Ohio Supreme Court stated in *DiCenzo*, the State of Ohio has a legitimate interest in determining when, and how, to apply its laws prospectively. Petitioner cannot credibly claim otherwise.

In a case factually similar to the case at bar, a Missouri Court of Appeals held that equal protection concerns are not implicated by prospective application of state laws. In that case, *Phuong Nguyen v. Tien V. Nguyen*, 882 S.W.2d 176 (Mo. Ct. App. 1994), the petitioner challenged the Missouri Supreme Court's conclusion that a certain law should have prospective application only. The petitioner claimed that such prospective treatment unreasonably precluded his ability to bring a cause of action under that law, and thereby violated "his equal protection rights under the Fourteenth Amendment of the United States Constitution..." *Id.* at 177. However, the Missouri Court of Appeals applied a federal equal protection analysis and held that the decision to apply a law prospectively-only was "reasonable, justified, and rationally related to a legitimate state interest." *Id.* at 179.

Therefore, even if Petitioner is able to overcome the numerous procedural obstacles outlined above, she would be unsuccessful in proving the substance of her claim, as the state action involved in this case simply does not implicate the equal protection clause of the Fourteenth Amendment.

V. CONCLUSION.

Certiorari should be denied because no federal issue was preserved for this Court to review; this Court has held, since 1932, that it is for the states to decide whether and when to apply their decisions prospectively only; *Harper* is not applicable to this case; Petitioner could not prevail on the merits; and the rule that Petitioner seeks would be bad public policy.

Respectfully Submitted,

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